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No. 94-1944

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1994

GERALD MOSS, Ph.D., M.D.,

Petitioner,

against

HARVEY BERNARD, M.D., Individually, and in his Official Capacity as a State Participant pursuant to Public Health Law Section 230,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Counterstatement of Questions Presented

1. Whether plaintiff's failure to raise in the district court the issue of defendant's alleged denial of his right to substantive due process in connection with the revocation of plaintiff's license to practice medicine in New York precludes his contention on appeal that this issue was not collaterally estopped by a state court determination that the revocation of plaintiff's license comported with due process.

2. Whether, in this action pursuant to 42 USC § 1983, this Court should grant certiorari to review a decision of the United States Court of Appeals for the Second Circuit that the doctrine of collateral estoppel precludes the present due process challenge to the revocation of plaintiff's license to practice medicine in New York, when a state appellate court determined in a prior proceeding that defendant's alleged actions had neither amounted to nor induced a deprivation of plaintiff's due process rights.

Table of Contents

Page

Counterstatement of Questions Presented i

Table of Authorities iii

Statement of the Case 2

REASONS FOR DENYING THE WRIT 9

POINT I. Plaintiff did not raise the issue of substantive due process in the district court 10

POINT II. The court below correctly concluded that the state-court decision collaterally estops plaintiff's substantive due process claim 13

Conclusion 18

TABLE OF AUTHORITIES

Page

CASES:

Alfonso v Fernandez, 195 AD2d 46 (2d Dept 1993) 14

Allen v McCurry, 449 US 90 (1980) 13

Benjamin v Coughlin, 905 F2d 571 (2d Cir), *cert denied,* 498 US 951 (1990) 13

Board of Regents v Roth, 408 US 564 (1972) 16

Browzin v Catholic University of America, 527 F2d 843 (DC Cir 1975) 12

Colton v Riccobono, 67 NY2d 571 (1986) 14

Daniels v Williams, 474 US 329 (1986) 12, 14

Davidson v Capuano, 792 F2d 275 (2d Cir 1986) 15, 16

Fay v South Colonie Central School Dist., 802 F2d 21 (2d Cir 1986) 15

Gargiul v Thompson, 704 F2d 661 (2d Cir 1983), *vacated,* 465 US 1016 (1984) 15

Halyalker v Board of Regents, 72 NY2d 261 (1988), *cert denied,* 498 US 951 (1990) 13

Harrah Independent School Dist. v Martin, 440 US 194 (1979) 17

Kelley v Johnson, 425 US 238 (1976) 17

Migra v Warren City School Dist. Bd. of Educ., 465 US 75 (1984) 16

Moss v Albany Medical Center Hospital, 61 AD2d 545 (3d Dept 1978) 5

Village Bd. of Trustees of Village of Malone v Zoning Bd. of Appeals, 164 AD2d 24 (3d Dept 1990) 14

Yee v City of Escondido, ___US___, 112 S Ct 1522, 118 L Ed 2d 153 (1992) 12

Zinermon v Burch, 494 US 113 (1990) 12

FEDERAL STATUTES:

Fed R Civ P 8(a) 7
12(b)(6) 6, 10

28 USC
§ 1738 (1994) 13

42 USC
§ 1983 (1994) 4, 16
§ 1988 (1994) 5

NEW YORK STATUTES:

N.Y. Civ. Prac. Law Article 78
(McKinney 1994) 14, 15, 16

N.Y. Civ. Prac. Law § 7803 (McKinney 1994) 15

N.Y. Public Health L (McKinney 1990)
§ 230-c(2) 3
§ 230-c(4)(a) 3
§ 230-c(4)(b) 3
§ 230-c(4)(c) 3
§ 230-c(5) 3, 6
§ 230(5) 2
§ 230(6) 2
§ 230(6)(10)(e) 3
§ 230(10(a) 2
§ 230(10)(a)(iii) 2, 4
§ 230(10)(a)(iv) 2
§ 230(10)(b) 3
§ 230(10)(c) 3
§ 230(10)(e) 3
§ 230(10)(f) 3
§ 230(10)(g) 3
§ 230(10)(i) 3

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Statement of the Case

The Statutory Scheme for Dealing with Professional Medical Misconduct

The New York State Board for Professional Medical Conduct ("the Board") is empowered to "investigate on its own any suspected professional misconduct" of medical licensees, and required "to investigate each complaint [of such misconduct] received regardless of the source." NY Pub Health L § 230(10)(a) (McKinney 1990). The investigation is conducted by an "investigation committee," consisting of two physicians and one lay member appointed by the Board chairperson. *Id.* § 230(5), (6), (10)(a)(iii). When a case has been referred to an investigation committee, the physician being investigated is afforded "an opportunity to be interviewed by the office of professional medical conduct in order to provide an explanation of the issues under investigation." *Id.* § 230(10)(a)(iii). "Providing an opportunity for" this interview, at which the licensee may have counsel present, is "a condition precedent to the convening of an investigation committee on professional misconduct." *Id.*

If, after investigating, the majority of the investigation committee concludes that a hearing is warranted and the Director of the Office of Professional Medical Conduct, after consultation with the Executive Secretary of the Board, agrees, the Director directs counsel to prepare charges against the physician. *Id.* § 230(10)(a)(iv). These charges must state "the substance of the alleged professional misconduct" and "the material facts . . . by which the charges are to be proved." *Id.*

§ 230(10)(b). The filing of charges triggers a hearing before a committee on professional conduct, composed (like the investigation committee, although with different personnel) of two physicians and a lay person. *Id.* § 230(6)(10)(e). The hearing is conducted by this committee and an administrative officer, who is designated by the Commissioner of Health and who rules on motions and other legal issues, but is not entitled to vote. *Id.* § 230(10)(e). The charged physician has the right, *inter alia*, to appear personally at the hearing, to be represented by counsel, to produce witnesses and evidence, to cross-examine adverse witnesses, and to have subpoenas issued in his behalf. *Id.* § 230(10)(c), (f).

Within thirty days of the hearing, the hearing committee is required to make findings of fact and conclusions concerning the charges, and (if the charges are sustained) to recommend a penalty. *Id.* § 230(10)(g). The hearing committee's conclusions and recommendations must be made by a majority of the committee. *Id.* The committee issues an order based on its determination, which may then be reviewed by the Administrative Review Board for Professional Medical Conduct ("the Review Board"). *Id.* § 230(10)(i). Either the charged physician or the New York Department of Health may seek review from this five-member Board, which consists of three physicians and two lay members. *Id.* § 230-c(2), (4)(a). The Review Board reviews "whether or not the determination and the penalty are consistent with the findings of fact and conclusions of law and whether or not the penalty is appropriate." *Id.* § 230-c(4)(b). The Review Board's determinations are "based upon a majority concurrence" of the Review Board. *Id.* § 230-c(4)(c). An order of the Review Board is subject to judicial review by means of a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules. *Id.* § 230-c(5). Such a proceeding is commenced in the Appellate Division, Third Department. *Id.*

The Present Action

On December 27, 1993, plaintiff Gerald Moss ("plaintiff") commenced the present action pursuant to 42 USC § 1983 in the United States District Court for the Northern District of New York (4).[1] Plaintiff identified himself as "a physician formerly licensed to practice medicine in the State of New York," against whom a licensure proceeding concerning his surgical care of patients was brought, eventually resulting in a decision of a hearing committee that plaintiff had engaged in medical misconduct and a determination by the Review Board that plaintiff's license to practice medicine be revoked (5, 17).

According to plaintiff, the source of this allegedly unlawful revocation was not his own misconduct. Nor was it anything done, individually or collectively, by the five members of the Review Board, the three members of the hearing committee, the three members of the investigation committee, or the Director of the Board—by, in other words, anyone charged with making the decisions that led to this revocation. Rather, the sole defendant was Harvey Bernard, M.D. According to plaintiff, Dr. Bernard was one of two physicians designated to interview plaintiff pursuant to NY Pub Health L § 230(10)(a)(iii) in order to receive "an explanation of the issues under investigation" (5-6). In plaintiff's view, a "personal vendetta" between himself and Dr. Bernard led the latter "inappropriate[ly]" and "malicious[ly]" to "interjec[t]" himself into the disciplinary review process in order to injure plaintiff (6-8). Plaintiff alleged that Dr. Bernard "made or heavily influenced" the decision of the investigation committee and the Director to bring "formal medical misconduct charges" against plaintiff (8). This supposedly intentional and

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[1]Parenthetical citations are to the Joint Appendix filed by the parties in the court below.

malicious conduct, plaintiff alleged, was "fatal to a surgical innovator such as plaintiff," who—although by his own account nationally famous for his "innovative techniques" (13-17)—would then have these techniques scrutinized at a committee hearing "by physicians lacking sufficient specialized surgical expertise" because they were "not educated in currently accepted, evolving state-of-the-art surgical practice" (13-14).[2] Although the complaint did not allege either that Dr. Bernard participated on behalf of the Board at any formal stage of the disciplinary proceedings after the interview or that he testified at the hearing, he was alleged "to have misled others functioning as State participants" in the disciplinary process by mischaracterizing the nature of the surgery at issue and "choosing a retired physician to act as an expert witness against plaintiff" (18-19).

Plaintiff alleged that Dr. Bernard's "involvement in the review of medical care provided by plaintiff was undertaken with malevolence toward plaintiff," causing him harm and depriving him "of property and liberty interests without due process of law" (21). He sought compensatory damages, punitive damages, and attorney's fees pursuant to 42 USC § 1988 (22-23). In addition, having contended that "the practicing physicians" who decided his case were "uninformed as to [his] techniques and standing as an innovator" and thus lacked sufficient "educat[ion]" to judge his practices (13-14), plaintiff demanded a jury trial (4).

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[2]In an earlier case, the New York State courts found reasonable the conclusion of the Albany Medical Center Hospital that plaintiff's surgical practices violated accepted professional standards. See, Moss v Albany Medical Center Hospital, 61 AD2d 545 (3d Dept 1978).

The State-Court Proceeding

Before commencing the present action, plaintiff had begun a parallel state-court proceeding commenced pursuant to NY Pub Health L § 230-c(5) in the Appellate Division, Third Department. Like the present action, the state proceeding arose from the facts that a hearing committee of the Office of Professional Medical Conduct determined that plaintiff was guilty of gross negligence in his treatment of certain patients and that the Administrative Review Board for Professional Medical Conduct sustained this finding on appeal and revoked plaintiff's license to practice medicine in New York.

In this state-court proceeding, plaintiff raised an issue similar to the issue raised in the present action. In his verified petition and brief in state court, plaintiff alleged certain "due process objections" with respect to Dr. Bernard's alleged conduct, claiming that Dr. Bernard's "prejudice" against plaintiff deprived him of "a real opportunity to participate in the interview." In his main brief in state court, plaintiff argued that the involvement of the supposedly "biased" Dr. Bernard, as one allegedly "charged with recommending . . . whether or not charges should be brought" against plaintiff, meant that due process required annulment of the Hearing Committee's determination.

Decision of the District Court

While the state-court proceeding was still pending, Dr. Bernard moved in the district court to dismiss the complaint pursuant to Fed R Civ P 12(b)(6) on the ground, *inter alia,* that it failed to state a claim for relief. On May 9, 1994, the district court (McAvoy, J.) issued an oral decision granting the motion to dismiss (31). The court acknowledged its obligation, on a motion to dismiss on the pleadings, to assume as true the facts

alleged by plaintiff and to construe a complaint liberally and favorably to the plaintiff, requiring only that plaintiff make "a short and plain statement of the claim showing that the pleader is entitled to relief" (31-32, *quoting* Fed R Civ P 8[a]). Even under this lenient standard, the court found that plaintiff could "prove no set of facts which would entitle him to relief" (32).

The district court noted that its role in reviewing a State's revocation of a medical license is limited to determining whether the State had provided adequate avenues for redress and review of an arbitrary revocation (33-34). Summarizing the many layers of state administrative and judicial protection available to plaintiff and observing that plaintiff had invoked all of them, including judicial review, the court concluded that "[t]he disciplinary process . . . does indeed provide plaintiff with all the process that's due" (34-36). Even "assuming for the sake of this motion that defendant did indeed interview plaintiff with malicious intent," the court found it "plain that the state has satisfied the minimum fundamental requirement of due process," for it was likewise "clear that plaintiff had numerous opportunities at various stages of the administrative proceedings to bring to light all the plaintiff's concerns about the improprieties of the initial interview with the defendant" (38). Nor was it significant that plaintiff had "attempted to demonstrate that the defendant not only tainted the initial interview, but also tainted all of the subsequent hearings by misleading and mischaracterizing the evidence presented during the initial interview" (39). This argument, the court said, was "groundless because even assuming, arguendo, that the defendant did, in fact, act improperly during the initial interview, plaintiff had an ample opportunity to address those concerns to the committees in subsequent hearings and reviews," and plaintiff had not alleged "that the Committee[s] in any way denied him such an opportunity" (39).

Thus, regardless of how liberally the complaint was construed, "plaintiff ha[d] failed to allege that his due process rights were violated" (41).

Decision in the State-Court Proceeding

On November 23, 1994, the Appellate Division, Third Department confirmed the administrative determination against petitioner and expressly rejected plaintiff's due process claims made on the basis of Dr. Bernard's alleged conduct. The Appellate Division recognized that these claims were "raised . . . under the rubric of denial of due process" and noted that "there must be a factual demonstration supporting the allegation" of bias against Dr. Bernard "and proof that the outcome [challenged by plaintiff] flowed from it" (28a).[3] In the Appellate Division's view, because there was no indication that Dr. Bernard's "alleged bias infected the Hearing Committee or the Review Board, thereby disabling those bodies from hearing and deciding this matter on the basis of the evidence presented at the hearing," plaintiff "was not denied due process" (28a).

The Decision Below

By the time of the Appellate Division's decision in the state-court proceeding, the parties had fully briefed the appeal of the present action in the United States Court of Appeals for the Second Circuit. Because of the identity between the due process issue raised in the state-court proceeding on the basis of Dr. Bernard's alleged conduct and the due process claim asserted directly against Dr. Bernard in the case at bar, Dr. Bernard sought and was granted permission to file a supplemental brief

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[3]Parenthetical citations followed by "a" are to the Appendix to the petition herein.

indicating that relitigation of the due process issue in the present action was barred by the doctrine of collateral estoppel.

On February 24, 1995, the Second Circuit issued an unpublished "summary order" affirming the judgment of the district court. The court noted that plaintiff "is collaterally estopped from bringing his federal suit because the issues raised in the complaint have been resolved in a parallel state court decision rendered since the complaint was dismissed" (2a). The Third Department's decision, the court below said, "disposes of [plaintiff's] procedural and substantive due process claims" (2a). According to the Second Circuit, "[b]ecause the state court's decision determines that the decision to revoke [plaintiff's] license was not 'arbitrary or irrational or motivated by bad faith' [cit om], it collaterally estops [plaintiff] from bringing a procedural or substantive due process claim in federal court" (3a).

The court below affirmed the district court's judgment "without prejudice to [plaintiff's] moving to reopen should the New York Court of Appeals overturn the Appellate Division's decision" (3a). On March 30, 1995, the New York Court of Appeals denied plaintiff's motion for leave to appeal in the state-court proceeding (24a), thus concluding his state-court challenge in connection with the revocation of his medical license.

REASONS FOR DENYING THE WRIT

Because plaintiff did not raise the issue of substantive due process in the district court, he may not make it the basis of his petition for certiorari. Even if the issue is preserved for this Court's review, and even if every allegation of the complaint is credited, plaintiff raises no issue of general importance meriting this Court's scrutiny. Nor, in any event, did the court below err

in dismissing the complaint because plaintiff is collaterally estopped by a prior state court judgment from raising the issues he attempts to raise.

POINT I

Plaintiff did not raise the issue of substantive due process in the district court.

The issue of substantive due process, which forms the sole basis for plaintiff's claim that the state-court proceeding did not have a preclusive effect on the present action, was never raised in the district court. Only on appeal did plaintiff contend that the "due process" component of his complaint had a substantive element instead of or in addition to its apparently procedural basis. Having failed in the district court to raise the issue of violation of his substantive due process rights, plaintiff cannot now premise a petition for certiorari on the continued viability of such an issue in the wake of the state-court proceeding.

It cannot be seriously contended that the complaint sounds in substantive due process. In his memorandum of law in the district court—the only document by which plaintiff was entitled to explain the gravamen of his complaint on this motion pursuant to Fed R Civ P 12(b)(6)—plaintiff makes clear that he is attempting to state a cause of action for *procedural* due process. Neither the term "substantive due process," the concept it betokens, nor any cognate terms or concepts appear in this brief any more than they appear in the complaint. Instead, plaintiff's entire discussion of his "due process" claim makes clear that the claim is strictly procedural in its nature. According to plaintiff:

> The defendant correctly cites that the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner," [cit om], and that a due process violation occurs if an individual is "denied a fair forum for protecting his state rights." [Cit om].
>
> The denial of a fair and meaningful opportunity to be heard is exactly what Dr. Moss alleges in that he submits, among other things, that the defendant: purposefully interjected himself into the review process for the sole purpose of injuring Dr. Moss; knowingly performed a biased review of plaintiff's patient care; chose a retired "expert" who was not qualified to review the specialized, innovative procedure at issue; wrongfully made or heavily influenced the decision that formal medical misconduct charges should be brought for reasons unrelated to the patient care under review; misled other State participants by categorizing the specific patient care at issue as routine surgery rather than procedures involving innovative techniques, the review of which required special knowledge, including, but not limited to, Critical Care; and based on the above tainted all further review of the allegations against Dr. Moss. (Memorandum of Law pp 12-13.)

The claim that plaintiff has been denied "a fair and meaningful opportunity to be heard," which according to plaintiff is "exactly" what he asserts, sounds exclusively in procedural due process. This Court has carefully distinguished between the "substantive component" of the due process clause, which "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them,'" and procedural due process, which is "a guarantee of fair procedure."

Zinermon v Burch, 494 US 113, 125 (1990) (*quoting Daniels v Williams*, 474 US 329, 331 (1986)). By his own account in the district court, plaintiff's due process claim is of the latter sort.

This means that plaintiff cannot raise a substantive due process claim at any subsequent stage of the case. It is well established that a claim not raised in the district court cannot be raised for the first time on appeal. *See, e.g., Yee v City of Escondido*, ___ US ___, 112 S Ct 1522, 1524, 118 L Ed 2d 153 (1992) (on appeal from state court, substantive due process claim "is not properly before this Court because it was not raised below or addressed by the state courts"). Obviously, a plaintiff cannot assert a dubious claim for "due process," lead the district court and his opponent to regard it as based on his procedural rights, and then, when his complaint is dismissed for its insufficiency, contend on appeal that the decision below is incorrect. But that is precisely what plaintiff now attempts.

As one federal court has succinctly observed, a claimant "cannot expect to lose in the trial court on one theory but win on appeal under another." *Browzin v Catholic University of America*, 527 F2d 843, 850 n 10 (DC Cir 1975). By plaintiff's own account, the sole question entitling him to review by this Court is whether the issue of substantive due process in the present case remains viable in light of the preclusive effect of the state-court decision on "due process." The substantive due process issue, however, was never raised in the district court. Accordingly, it cannot serve as the basis for the present petition, and the writ of certiorari should be denied.

POINT II

The court below correctly concluded that the state-court decision collaterally estops plaintiff's substantive due process claim.

Evidently eager to dispose of plaintiff's specious case as simply as possible, the court below assumed *arguendo* that the complaint stated a claim for violation of plaintiff's substantive due process rights and concluded that the Appellate Division's decision "collaterally estops [plaintiff] from bringing a procedural or substantive due process claim in federal court" (3a). It is not clear how this unpublished decision, which may "not be cited or otherwise relied upon in unrelated cases" in any court (3a), can possibly have the "far reaching implications" (Petition, p 17) that (according to plaintiff) compel a grant of certiorari. But the Second Circuit's decision was in any event simply and straightforwardly based on well-established law, and requires no review by this Court.

In determining the preclusive effect to be given a state court judgment, a federal court must give that judgment the same effect it would have in the courts of that state under state law. *Allen v McCurry*, 449 US 90, 96 (1980); *see* 28 USC § 1738 (1994). Under New York law, "[a]pplication of the doctrine of collateral estoppel requires a finding of 'the identicality of an issue necessarily decided in the prior action' and 'a full and fair opportunity to contest the issue in the prior action.'" *Benjamin v Coughlin*, 905 F2d 571, 575 (2d Cir) (*quoting Halyalker v Board of Regents*, 72 NY2d 261, 266 (1988)), *cert denied*, 498 US 951 (1990). As plaintiff notes (Petition, p 18), a substantive due process claim entails a contention that the government action at issue is substantively and deliberately arbitrary, notwithstanding the fairness of the procedures that

implement it. *Daniels v Williams*, 474 US 327, 331 (1986). As the Second Circuit recognized (2a-3a), the state court decision for which preclusive effect is claimed held squarely that the administrative determination to revoke plaintiff's license to practice medicine "ha[d] a rational basis that [was] supported by fact" and was not "arbitrary and capricious, affected by an error of law or an abuse of discretion" (29a-30a). Thus, the Second Circuit concluded, "[b]ecause the state court's decision determines that the decision to revoke [plaintiff's] license was not 'arbitrary or irrational or motivated by bad faith,' [cit om], it collaterally estops [plaintiff] from bringing a procedural or substantive due process claim in federal court" (3a).

Plaintiff challenges this straightforward application of the doctrine of collateral estoppel by suggesting that he lacked a full and fair opportunity to litigate his substantive due process claim in state court. By plaintiff's own account, this is untrue. It is well established that a proceeding pursuant to Article 78 of the New York Civil Practice Law to challenge an administrative determination may encompass a substantive due process claim. *See, e.g., Colton v Riccobono*, 67 NY2d 571, 577 (1986); *Alfonso v Fernandez*, 195 AD2d 46, 56-59 (2d Dept 1993); *Village Bd. of Trustees of Village of Malone v Zoning Bd. of Appeals*, 164 AD2d 24, 28 (3d Dept 1990). Plaintiff's petition in the state court proceeding expressly raises what he characterized as "due process issues" with respect to Dr. Bernard's supposed "prejudic[e]" against him. If (as plaintiff contends) such an undifferentiated "due process" claim is sufficient to raise issues of both procedural and substantive due process in his federal complaint, then it is likewise sufficient to do so in his state court petition. He raised the issue either in both venues or in neither of them.

In addition, the Article 78 proceeding brought by plaintiff in state court expressly involves a judicial determination of whether an administrative determination "was affected by an error of law or was arbitrary and capricious or an abuse of discretion." NY Civ. Prac. Law § 7803(3) (McKinney 1994). This is obviously no different from a constitutional determination, made under the rubric of due process, as to whether substantive government action was unconstitutionally arbitrary or irrational. And indeed, the Second Circuit has recognized that "rational basis" review under NY Civ. Prac. Law § 7803 is the equivalent of a determination of a substantive due process claim asserted by a plaintiff in a federal action pursuant to 42 USC § 1983. *See, Fay v South Colonie Central School Dist.*, 802 F2d 21, 30 (2d Cir 1986); *Gargiul v Thompson*, 704 F2d 661, 666 (2d Cir 1983), *vacated on other grounds*, 465 US 1016 (1984).

Thus, as the Second Circuit recognized, plaintiff was entitled to raise and the state court empowered to decide his substantive due process claim. The Appellate Division's determination that the challenged state action was not arbitrary and capricious disposed of this issue not only in the state court proceeding but in all subsequent cases, including the present one, in which it might be raised. Plaintiff argues (Petition, pp 26-29) that there can be no collateral estoppel effect for the state court judgment in the present case because "a New York plaintiff is not barred from seeking damages on a civil rights claim in federal court even by reason of a prior judgment on the facts in an Article 78 proceeding." While this is true, *see, e.g., Davidson v Capuano*, 792 F2d 275 (2d Cir 1986), it is a dimension of the law of *res judicata*, or claim preclusion, rather than collateral estoppel, or issue preclusion. Whereas *res judicata* "refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated," collateral estoppel "refers to the effect of a

judgment in foreclosing relitigation of a matter that has been litigated and decided." *Migra v Warren City School Dist. Bd. of Educ.*, 465 US 75, 77 n 1 (1984). Thus, while *res judicata* does not bar a later claim in a § 1983 action when the claim itself could not have been asserted in a prior state court proceeding based on the same underlying facts, collateral estoppel *does* bar issues raised in a § 1983 action which were "previously litigated in the course of an Article 78 proceeding." *Davidson*, 792 F2d at 278, 282. The issue of substantive due process, insofar as plaintiff raises it at all in the case at bar, was raised and resolved in his prior state court proceeding, and is thus subject to preclusion under the doctrine of collateral estoppel.

Plaintiff further errs in contending that a due process violation can occur even if there is no deprivation of a liberty or property interest. He purports (Petition, p 20) to seek not "a review of the propriety of license revocation," as undertaken by the Appellate Division, but "a review of the fundamental unfairness of the initial interview procedure." A claim for denial of substantive due process, however, like one for denial of procedural due process, must be supported by an allegation that plaintiff has been deprived of a constitutionally-protected liberty or property right. *See, e.g., Board of Regents v Roth*, 408 US 564, 576-77 (1972). Plaintiff has no constitutional liberty or property right simply in an "unbiased" interview with Dr. Bernard. Indeed, by his own account (Petition, p 19) the constitutional rights at stake in the present case are plaintiff's liberty "to engage in any of the common occupations of life" and his "property right to his license to practice medicine."[4] It is precisely these rights,

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[4]The rights asserted by plaintiff cannot in any event support a substantive due process claim. Although a guarantee of procedural due process may lie with respect to any state-created right, substantive

(Continued on next page.)

however, that the state court, in concluding that "there is no proof that [Dr. Bernard's] alleged bias infected the Hearing Committee or the Review Board" which (unlike Dr. Bernard) adjudicated plaintiff's professional negligence and revoked his license (28a), decided were not infringed by Dr. Bernard. Plaintiff is not entitled to a federal-court determination on the identical issue. The point is not, as plaintiff claims, that Dr. Bernard threatens to "evade judicial review of his malicious conduct" (Petition, pp 25-26), but that the alleged conduct was unconnected with any deprivation of a property or liberty interest protected by substantive due process.

Thus, as the court below understood, plaintiff's substantive due process claim, even if it is deemed to have been made in the district court and every scurrilous and improbable allegation of the complaint is credited, was raised and resolved in plaintiff's prior state-court proceeding. Well-established principles of collateral estoppel therefore required that his complaint in the present action be dismissed. There is no reason for this Court to grant plaintiff a writ of certiorari in order to restate this unexceptionable conclusion.

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[4](Continued from previous page.)
due process generally protects only "'the individual's freedom of choice with respect to certain basic matters of procreation, marriage and family life.'" *Harrah Independent School Dist. v Martin*, 440 US 194, 198 (1979) (quoting *Kelley v Johnson*, 425 US 238, 244 (1976)). Plaintiff cites and defendant can locate no federal case in which the existence of a state-created licensing program was held to give rise to an interest protected by substantive due process.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: Albany, New York
June 15, 1995

Respectfully submitted,

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